No. 17-2417

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

V.

VICTORIA SPECTOR,

RESPONDENT,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Team 36
Attorneys for Respondent

ORIGINAL BRIEF

QUESTIONS PRESENTED

1. Whether a defendant's Constitutionally guaranteed right to confront witnesses against her is violated when she is denied the opportunity to cross-examine an interpreter who translated the defendant's foreign language statements into English.

2. Whether the Fifth Amendment privilege against Compelled Testimony prohibits the Government from offering statements made by a defendant to foreign law enforcement agents when those statements were the result of a compelled interrogation without the United States' participation.

3. Whether the Fifth Amendment privilege against Self-Incrimination prohibits the use of a suspect's pre-arrest post-*Miranda* silence during the Government's case-in-chief as substantive evidence of the defendant's guilt.

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CONSTITUTIONAL PROVISIONS

U.S. Constitution Amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

I. Statement of Facts

Respondent Victoria Spector ("Spector") is the Chief Executive Officer of Bank Plaza. R. at 2. Bank Plaza is the United States division of the National Bank of Remsen. *Id.* Remsen is an unstable nation, and has ongoing issues with a terrorist group based in Remsen known as DRB. *Id.*

In March of 2014 the Federal Bureau of Investigation began investigating whether Bank Plaza was redirecting funds intended for legitimate charities to the DRB. *Id.* at 3. As part of that investigation, the FBI interrogated Spector. *Id.* As Spector is more fluent in Remsi that English, the FBI brought an interpreter, Erik Multz ("Multz"), to facilitate the interrogation. *Id.* The interview was conducted by FBI Special Agent Jack Malone. *Id.* at 17. Special Agent Malone failed to record either audio or video of the interrogation. *Id.* During the interview, Multz would translate the questions and responses from English to Remsi and vice versa. *Id.* The interpretations provided by Multz, who only worked as an interpreter for two months, were flawed as they provided grammatically inconsistent responses attributed to Spector. *Id.* Multz also had previously fled Remsen because of the activities of the DRB. *Id.* at 18.

Remsi is a particularly difficult language to translate, as it is unlike any other language. *Id.* at 21. Where English has one word used for the second person, you, Remsi has four words, and which one is used depends on many factors. *Id.* Remsi also only has one word which means both "I" and "we," with the context of the sentence determining whether it refers to the singular or plural. *Id.* As a result, translating between Remsi and English requires a high degree of subjectivity and is ripe for mistranslations. *Id.*

Multz's translation of Spector's statement has several inconsistencies regarding personal pronoun use. *Id.* at 19-20. For example, when asked who ultimately decided which charities would be donated to, Multz relayed Spector's statement as "I'm the CEO. We had the final word. We did good work, Agent, I wanted to help the Remsi people." *Id.* Later, when asked if Spector oversaw the charities the bank worked with, Multz translated the response as, "Yes, we did." *Id.*

Following the interview Spector returned to Remsen, where she remained from February to July 2015. *Id.* at 13. While there Spector was interrogated by Remsen's highest-level

investigative agency, the RIA. *Id.* at 14. A video recording of that interview was released to the news and was reported by all of the major media outlets in the United States. *Id.* During the interview Spector referenced several charities which the FBI believed were being used to funnel money to the DRB. *Id.*

On April 14, 2016 a warrant was issued for a search of Spector's home and her arrest. *Id.* On April 15, 2016 the FBI arrived at Spector's home to execute the warrants. *Id.* at 15. At the time, there were thirty cars in the driveway and on the street outside of the home. *Id.* The agents entered the house and discovered there was a party at the house, with fifty people on the first floor of the house. *Id.* The agents announced to the guests that they were there to search the house and arrest Spector. *Id.* They then placed Spector in a chair in the view of her guests. *Id.* While Spector was sitting in the chair with an agent on either side of her, a third agent turned to her and, in a voice loud enough for Spector's guests to hear, said, "It's disgusting that you would help funnel money to terrorists who kill their own people and who hate the United States and would use that money to attack us. . . . It's just shameful." *Id.*

Spector did not respond to the comment but remained staring straight ahead. An agent then read Spector her *Miranda* rights and formally placed her under arrest. *Id.*

II. Procedural History

Petitioner Victoria Spector was charged with conspiring to provide, and providing, material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B. Spector is the Chief Executive Officer of Bank Plaza, the United States division of the National Bank of Remsen. Spector filed three pre-trial motions *in limine* with the District Court. Spector first argued that, because the interpreter present when Spector was interviewed by federal agents is unavailable to testify at trial, the translated statements attributed to Spector should be excluded on the grounds that she would not have the opportunity to cross-examine the interpreter in

violation of the Sixth Amendment Confrontations Clause. Spector next argued that, in light of the widespread dissemination of a recording of testimony compelled from her by agents of her native country, the Government be required to establish, at a *Kastigar* hearing, an independent source for all evidence it intended to offer against her at trial. Spector also argued that the evidence that she remained silent when an arresting officer made accusatory statements to her after she was placed under arrest but before she received *Miranda* warnings should be excluded.

The District Court granted all three motions. After conducting a *Kastigar* hearing, the District Court precluded the Government from offering any evidence it developed after the recording of Defendant's compelled testimony was publicly released. The Government appealed the District Court's rulings to the United States Court of Appeals for the Fourteenth Circuit.

The Fourteenth Circuit affirmed the District Court's findings and held that the translated statements, compelled testimony, and references to Spector's silence in the face of accusation violated Spector's constitutional rights. The Government has appealed these rulings and upon grant of *writ of certiorari* this Court reviews the decision of the Fourteenth Circuit *de novo*.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision because (1) the statements made by Spector in her native tongue to the FBI are inadmissible unless Spector is given an opportunity to cross-examine the translator who converted her statements from Remsi into English; (2) the use or derivative use of the compelled statements Spector made to the Remsen National Security Agency are inadmissible as a violation of the Fifth Amendment right against Self-Incrimination; and (3) Spector's silence in response to the verbal accusations of the FBI agent is inadmissible as substantive evidence of her guilt.

First, the Confrontation Clause guarantees all defendants the right to confront those who make testimonial statements against them. The Court has made clear that confront means to put the witness through the crucible of cross-examination. A testimonial statement is a statement given with the purpose in aiding a prosecution against someone else. In cases involving a defendant whose statements have been translated into English, such as is the case here, there are two sets of testimonial statements. First, the foreign language statement of the defendant. Second, the English translation of that statement by the interpreter.

This Court should reject the "language-conduit" theory proposed by the majority of circuits and properly recognize that an interpreter is much more than a "mere scrivener," and as such is always making out-of-court testimonial declarations when interpreting a defendant's foreign language statements.. If the Court is unwilling to make such a per se rule, then it should adopt the four-part test applied by the Ninth Circuit. The test is utilized to determine if the interpreter's statements can be fairly attributed to the defendant. If not, then the Confrontation Clause is triggered. In this case, all four factors reveal that the interpreter's statements cannot be fairly attributed to Spector, and thus she has a right to confront the interpreter.

Second, in order to be used against a Defendant at trial, all statements made by that Defendant must be voluntary and without coercion. The principle applies even to statements made to a foreign law enforcement official without any direction of that official's actions by American authorities. Here, the statements in question were compelled under the laws of a foreign authority, thus rendering them involuntary such that admission against Spector would be a violation of the Fifth Amendment privilege.

Third, Spector's silence in response to the accusations made by the FBI is inadmissible in the Government's case-in-chief. The FBI agent's conduct should have reasonably been expected

to illicit an incriminating response and therefore required that Spector be Mirandized. Additionally, the Fifth Amendment privilege applies to post-arrest, pre-Miranda silence.

Custodial interrogation occurs whenever police conduct should reasonably be expected to illicit an incriminating response from a suspect who is in custody, thus triggering the requirement of *Miranda*. Here, while Spector was in custody, the FBI agent sat Spector down in a chair as her house was searched and proceeded to make goading statements which should have reasonably been expected to elicit an incriminating response. Therefore, her silence is inadmissible because Spector should have been Mirandized before such conduct was undertaken by the FBI agents.

Additionally, Spector's right to not have her silence in the face of accusations used against her in the Government's case-in-chief applies to post-arrest pre-Miranda silence. Use by the Government of Spector's silence in the face of accusations made while the Spector was in custody would remove all power from the right to remain silent, as Spector would be forced to incriminate herself no matter whether she remained silent or not. The use of this evidence as substantive proof of guilt would be testimonial in nature as it would lead to an inference that Spector intended to communicate that she had no valid response to the accusations put to her. Furthermore, this Court has stated that the Fifth Amendment privilege protects persons in all circumstances from Self-Incrimination, and the Court has consistently rejected any insinuation that the right to remain silent only becomes effective upon the giving of the *Miranda* warnings. As such, Spector's post-arrest pre-Miranda silence is inadmissible as substantive evidence of her guilt in the Government's case-in-chief.

ARGUMENT

I. Ms. Spector Has the Right to Confront Interpreter Multz Because His Translations are Testimonial and Cannot Be Fairly Attributed to Ms. Spector

Ms. Spector has a Sixth Amendment right to cross-examine Erik Multz, the interpreter of the statement at issue here. The Confrontation Clause of the Sixth Amendment guarantees that, "[i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This Court clarified the scope of that amendment in *Crawford v. Washington*, where it stated "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" the declarant. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

The Court further explained that testimonial statements are ones "that declarants would reasonably expect to be used prosecutorially." *Id.* at 51. Additionally, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. When dealing with out-of-court declarations, "[u]navailability of the declarant and the prior opportunity to cross-examine the declarant are limitations required to satisfy the Sixth Amendment. *United States v. Charles*, 722 F.3d 1319, 1323 (11th Cir. 2013) (citing *Crawford*, 541 U.S. at 54). Particularly important is the prior opportunity to cross-examine the declarant, which this Court noted is "dispositive" to the determination of whether such testimonial statements are admissible. *Crawford*, 541 U.S. at 55-56.

In deciding *Crawford*, this Court was careful to separate the Confrontation Clause's requirements from those of the Federal Rules of Evidence. The Court had earlier ruled that all out-of-court statements were admissible so long as the fell under a "firmly rooted hearsay

exception" or "bore particularized guarantees of trustworthiness." *Id.* at 60 (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)). Instead, the constitution demands that "reliability [of testimonial statements] be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

There cannot be any serious disagreement here that Spector's out-of-court statements, translated by Multz, were testimonial in nature. By extension, the statements made by Multz in translating Spector's statements are also testimonial. The true question before this Court is whether Multz was the declarant of the translated testimonial statements. This Court should find that Multz was a declarant of testimonial statements within the context of the Confrontation Clause, thus entitling Spector to confront the witness against her, testing Multz through the crucible of cross-examination.

A. This Court should adopt the Eleventh Circuit's approach from *Charles* and hold that an interpreter's translation of a foreign language statement is per se testimonial triggering Sixth Amendment protections.

The Court should reject wholesale the "language conduit" theory, adopted by the majority of circuits, under which the interpreter is merely a conduit for the defendant's statements, and as such does not make any statements. *See Guan Lee v. United States*, 198 F. 596 (7th Cir. 1912); *see also United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012); *United States v. Vidacak*, 553 F.3d 344 (4th Cir. 2009); *United States v. Sanchez-Gondinez*, 444 F.3d 957 (8th Cir. 2006). Under this theory, the translator essentially functions as an agent of the speaker, and thus any translated statements are those of the speaker. *United States v. Santana*, 503 F.2d 710, 717 (2d Cir. 1974). Instead, the Court should adopt the rule put forth by the Eleventh Circuit Court of Appeals, which held that an interpreter is the declarant of out-of-court testimonial statements translated by the interpreter. *Charles*, 722 F.3d at 1323. Doing so would recognize the inherent subjectivity in translating statement from one language to another, and ensure that foreign

language defendants are allowed to confront the interpreters who are asked to speak on their behalf.

When a defendant is interrogated by police with the aid of an interpreter, there are two sets of testimonial statements: first, the defendant's statements made in his native tongue and second, the interpreter's English language translation of the defendant's statements. *Id.* at 1324. In *Charles,* the defendant was a Haitian woman who attempted to enter the United States through Miami International Airport. *Id.* at 1321. She presented the Customs and Border Patrol ("CBP") officer with her travel documents, which included her Form I-512. *Id.* Form I-512 is used to provide authorization to enter and exit the United States for individuals who are in the process of gaining legal immigration status. *Id.*

Two CBP officers examined the defendant's I-512, and found that the name and date-of-birth on the form did not match those associated with the I-512 in the database. *Id.* The defendant was then taken into a secondary screening room where she was interrogated by a third CBP officer. *Id.* Because the defendant did not speak English, and the CBP officer did not speak Creole, the interrogation was aided by a telephone translator service provided by the Department of Homeland Security. *Id.* The interpreter translated both the officer's questions to the defendant and the defendant's responses. *Id.*

At trial, the government did not call the interpreter to testify, instead relying on the testimony of the three CBP officers. *Id.* The interrogating officer told the jury what the interpreter told the officer the defendant said. The government's failure to call the interpreter to testify denied the defendant the opportunity to cross-examine the interpreter about the accuracy of the translations or what words or phrases were actually used. *Id.* Of crucial importance were the interpreter's assertions that the defendant said the I-512 "didn't fit her profile," and that the

defendant knew the form was "illegal." *Id.* at 1321-22. Without the opportunity to cross-examine the interpreter, the defense attorney was unable to inquire into whether the defendant actually stated the document "didn't fit her profile," or whether she used "different words which the interpreter characterized as not 'fitting her profile.'" *Id.* Similarly, when the interpreter declared that the defendant knew the form was "illegal," there could be no inquiry into the actual Creole words used by the defendant and whether those words could have other meanings besides "illegal." *Id.* at 1322.

The court in *Charles* held that the defendant had a Sixth Amendment right to confront the interpreter. This was largely because the statements of an interpreter and the defendant are not one and the same, because "[l]anguage interpretation does not provide for a 'one-to-one correspondence between words or concepts in different languages.'" *Id.* at 1324 (quoting National Association of Judiciary Interpreters and Translators, Frequently Asked Questions about Court and Legal Interpreting and Translating, http://www.najit.org/certification/faq.php#techniques). Additionally, interpreters usually "[c]onvert concepts in the source language to equivalent concepts in the target language." *Id.* (citing U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook* (2012-13 ed.)).

Essentially, the Eleventh Circuit correctly noted that translating between two languages is unlike code-breaking. Proper translation is not a matter of simply hearing a Creole word and selecting its exact English counterpart. Language is highly contextual, and thus there is always a level of subjectivity on the interpreter's part in translating between two languages. That is particularly relevant here.

Here, Spector finds herself in an identical position as the defendant in *Charles*. The government is attempting to use an interpreter's version of Spector's statements against her in

court to prove her guilt. It is the definition of a testimonial statement, which should trigger full Confrontation Clause protections. Yet Spector is unable to test the interpreter's statements in the crucible of cross-examination because the government is unable to supply the interpreter as a witness. The Confrontation Clause demands that Spector be able to confront the witness against her, and nothing less than an opportunity to cross-examine the interpreter will suffice.

As noted in the Record, Spector's native language Remsi is particularly unique. R. at 21. According to Distinguished Professor of Linguistics Ana Ruma, translating Remsi into English requires the translator to "hear the words in Remsi, derive meaning from those words, and find the right words to portray that meaning in English. . . . Such an interpretation is shaped by the interpreter's cultural background and personal experiences, not just fluency in either language."

The rejection of the language conduit theory is also compelled by the Court's decision in *Bullcoming v. New Mexico*, 546 U.S. 647 (2011). In *Bullcoming*, this Court correctly held that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial,' and therefore within the compass of the Confrontation Clause." *Id.* at 658-59. The certification in question was to validate a blood alcohol test performed on the defendant. *Id.* at 653. The prosecution did not offer the certifying analyst as a witness, but did provide an expert witness who could explain the procedures used to perform the blood analysis. *Id.* at 654.

The Court rejected the New Mexico Supreme Court's decision that the analyst was simply a transcriptionist for the gas chromatograph machine who did not interpret the results or exercise independent judgment. *Id.* at 649. Similarly, this Court rejected the lower court's opinion that the machine was the true accuser while the analyst was a "mere scrivener." *Id.* (internal quotation marks omitted). As a result, the defendant was entitled to confront his accuser, the analyst.

The language conduit theory adopted by the majority of the circuits relies on similar reasoning to the rejected reasoning of the New Mexico Supreme Court in *Bullcoming*. Under the language conduit theory, the interpreter is a "mere scrivener," and does not actually testify at all. Such a theory ignores the reality of interpretation. As shown in the record, and recognized in *Charles*, translating between languages is inherently subjective. This is doubly true where a highly contextual language such as Remsi is concerned. The interpreter is much more than a simple input/output machine, and instead analyzes the foreign language, determines its English equivalent in both form and meaning, then speaks his interpretation of what was said. If a "mere scrivener" is required to undergo the crucible of cross-examination due to his testamentary statement, then an interpreter presenting his subjective translation of Spector's statement must also be compelled to testify.

B. Alternatively, this Court should apply the Ninth Circuit's test and find that the Interpreter's statement cannot fairly be attributed to Ms. Spector.

If the Court is unwilling to adopt the per se *Charles* rule, it should instead apply the Ninth Circuit's *Nazemian* test, which will show that the interpreter's statements should not be attributed to Spector. Under the *Nazemian* test, courts will apply a four-prong analysis to determine "whether the translated statements fairly should be considered the statements of the speaker." *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991). Those four factors are which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated. *Id.*

The first factor looks to who provided the interpreter. Admittedly, no circuit has held that the interpreter being provided by the government is dispositive in and of itself. *See United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989); *United States v. Alvarez*, 755 F.2d 830, 859

(11th Cir. 1985); *United States v. Da Silva*, 725 F.2d 828, 832 (2d Cir. 1983). In this case, the interpreter was provided by the government. While that is not dispositive, it should still be considered as suspect by the Court.

The second factor looks to whether the interpreter had any motive to mislead or distort the statement. *Nazemian*, 948 F.2d at 527. In *Nazemian*, concerns were raised that the interpreter, an undercover DEA agent, would have motivation to distort his translations in order to bolster his case. *Id.* at 528. The Ninth Circuit dismissed those concerns, pointing out that any mistranslation could have threatened the DEA's objective and potential future prosecutions. *Id.* However, there was never any evidence raised to support the concerns, which allowed the court to easily dismiss them.

Here, there is evidence in the record that shows the interpreter may have had a motivation to mislead or distort the truth. Spector is charged with diverting funds to aid a separatist group in Remsen. There is evidence that the government-supplied interpreter fled Remsen because of the activities of that separatist group. That evidence alone should be sufficient to nullify any agency relationship between Spector and the interpreter. It should at least be sufficient to entitle Spector to cross-examine the interpreter in court, where his motivations to mislead or distort Spector's words can be tested in the crucible of cross-examination.

The third factor are the interpreter's qualifications and language skill. *Id.* In *Nazemian*, the court looked to the ongoing relationship between the appellant and the interpreter as an interpreter. The interpreter had served as the interpreter "over the course of repeated, lengthy meetings." *Id.* Additionally, the appellant herself referred to the interpreter as the interpreter, and indicated she relied on the interpreter to speak French for her. *Id.* The court specifically noted

that the prolonged period for which the interpreter served as such made up for the failure of the government to present "formalized evidence of the interpreter's competence, such as language degrees or certifications . . .." *Id.*

In this case there is a similar dearth of evidence regarding the qualifications of the interpreter. There is no formalized evidence of any language degrees or certifications, aside from unproven assertions by the government that the interpreter possessed certifications. However, unlike in *Nazemian*, there is also no ongoing relationship to make up for that lack of evidence. Here the interpreter was present for one interview. At the time of the interview, he had only been employed as an interpreter for two months. At no point did Spector ever state that she relied on the interpreter or trusted him as such.

In fact, the only evidence which may hint at the interpreter's qualifications indicates that he was incompetent. As the record reflects, the interpretation provides fluctuates between the use of singular and plural personal pronouns, even in the same sentence. That fluctuation could also prove dispositive to the entire case, let alone the present issue, as it could prove the difference between an admittance of guilt or not. Determining the quality of the interpretation and the credibility of the interpreter is precisely the point of the Confrontation Clause, and is a determination which can only be made through the crucible of cross-examination.

The final factor which is looked at is whether actions taken after the interpreted conversation are consistent with the interpretations. *Id.* at 527. In *Nazemian*, there was evidence that the appellant acted consistently with the translated statements. *Id.* The presence of this evidence was possible largely because of the multiple meetings between the DEA and the appellant, as well as the appellant's statement that she viewed the interpreter as her interpreter. *Id.*

However, here there is no evidence as to whether or not Spector acted consistently with the translated statements. In part, that is due to the poor nature of the translations. When the translated statement fluctuates between the singular and plural possessive pronouns, it is impossible to determine whether Spector was actually discussing acting individually or in a group. Without that knowledge, there is no way to tell whether her actions were consistent. This again points to the need for Spector to confront the interpreter.

All four factors of the *Nazemian* test favor Spector in this case. The government provided the interpreter, there is evidence the interpreter had motivation to distort the meaning of the translated statements, there is no formalized evidence regarding the qualifications of the interpreter, and there is nothing to show that Spector acted consistently with the translated statements. Therefore, this Court should affirm Spector's right to confront the witness against her.

II. The Use or Derivative Use of the Statements Spector Made to the Remsen National Security Agency Are Inadmissible as a Violation of Ms. Spector's Fifth Amendment Right Against Compelled Self-Incrimination

A. A defendant's statement cannot be used against them unless it was freely and voluntarily given

It is a bedrock principle of the Constitution that any confession, in order to be admissible in any Court in the United States, "must be free and voluntary." *Bram v. United States*, 168 U.S. 532, 543 (1897). Compelled testimony and confessions are disallowed not because they are inherently less trustworthy, but rather the use of coercion offends the traditional notions of fundamental fairness upon which our Constitution is based. *Rochin v. California*, 342 U.S. 165, 173–74 (1952). One of these principles is that the Government must prove guilt by "independently and freely secured" evidence and may not use coercion to "prove its charge against an accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961).

As this Court has unequivocally stated at every opportunity, "Voluntariness has been the 'only clearly established test in Anglo-American courts for two hundred years.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)). Thus the constitutionally mandated question in all cases of a confession made by a defendant is whether or not "[T]he confession the product of an essentially free and unconstrained choice by its maker?" *Id.* This is true regardless of the time, place, or manner in which the confession occurred. The Constitutional proscription on compelled Self-Incrimination exists in "all settings" and therefore makes no distinction as to whom it was that elicited the confession if such a confession was coerced. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). To allow such coerced and compelled testimony to be used against Spector in her trial would sanction conduct which discredits American law, and thereby brutalizes the temper of a society. *Rochin*, 342 U.S. at 173–74.

Additionally, this Court has consistently applied the principle that "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); see also *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Under this rule, it is immaterial at what point in the investigative process a compelled statement is made. The Court's precedent is clear that a compelled confession in and of itself is not a violation of the Constitution, but rather that the violation occurs when a person is compelled to testify against themselves in a trial. *Id.* Therefore, the actions of the FBI, and the point at which the FBI became aware of the statements made have no bearing on the admissibility of a compelled confession. The only question of Constitutional significance is whether or not the statements made by Spector were made voluntarily and free from compulsion.

This Court should affirm the Fourteenth Circuit and rule the compelled confession made by Spector to the foreign authorities inadmissible. The Government has the burden to demonstrate by a preponderance of the evidence that any statements were made voluntarily based on the totality of the circumstances. The record and the certified question both clearly acknowledge that the statements were compelled and therefore not voluntary. It bears mentioning that the plain reading of the Fifth Amendment uses the word "compelled" to indicate the type of Self-Incrimination explicitly barred by that Amendment. U.S. Const. amend. V. As such this Court should hold that the findings of the District Court's *Kastigar* were proper and the compelled confession is inadmissible.

B. Ms. Spector did not freely and voluntarily provide the statements to the foreign officials making them inadmissible

Admission of a compelled statement of the accused patently offends the very text of the Fifth Amendment and violates one of the most sacred and honored traditions of the United States Constitution: that no person be forced to confess to any crime under duress or threat of criminal sanction for the failure to do so. The Court has emphatically held for hundreds of years that the use of a compelled statement or confession is precisely what the Fifth Amendment was designed to defend against. *Miranda*, 384 U.S. at 467. Nothing could be clearer in the intent of the Framers than that it is "axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991).

The legally significant facts of this case are closely aligned with those found in *Bram v. United States*. In *Bram*, the defendant was a first mate aboard an American vessel travelling in the Atlantic Ocean. *Bram*, 168 U.S. at 534. He was accused of murdering the captain of the ship

and the captain's wife. The ship's crew took custody of the defendant and made port in Halifax, Nova Scotia. *Id.* at 536. Upon arrival, the defendant was taken into custody by the Canadian authorities, strip-searched and questioned about the events which occurred on the ship. *Id.* All of these events occurred without any direct involvement of American officials outside of the order to hold the defendant.

There was little doubt in the reasoning of the Court that the actions of the Canadian investigator were completely independent of any direction by the American consul. *Id.* at 561. The denials made by the defendant to the Canadian investigator were ruled by the Court to be wrongly admitted over defense's objections. The Court also held that rule enumerated in the Fifth Amendment "was in its essence comprehensive enough to exclude all manifestations of compulsion...." *Id.* at 548.

Just like the defendant in *Bram*, Spector was placed in the custody of foreign officials for the purposes of an investigation into her allegedly criminal behavior. There was no direct involvement by the American officials who were conducting their own independent investigation into Spector's conduct at the time. Unlike *Bram* however, the record is unambiguous as to the compelled nature of Spector's confession. The law in Remsen mandates that such confessions be given under penalty of law.

The longstanding rule of law requiring that any statements made by the accused need be voluntary in order to be used against them holds true the same today as it did in 1897 when this Court first decided the issue. As such the Court should hold to its prior precedent and affirm the Fourteenth Circuit.

The Second and Ninth Circuits have specifically held that the right against Self-Incrimination applies to statements made by suspects to foreign officials. *United States v. Allen*,

864 F.3d 63 (2d Cir. 2017); *Brulay v. United States*, 383 F.2d 545, 549 (9th Cir. 1967); see also *United States v. Orlandez-Gamboa*, 320 F.3d 328, 333 (2d Cir. 2003). In *Allen*, the defendants were tried and convicted of wire fraud after independent investigations by both British and American authorities. *Allen*, 864 F.3d at 68. During the course of the British investigation, the defendants were subject to a compelled interview in which they were granted direct (but not derivative use) immunity. *Id.*

Although the Department of Justice did not involve itself in any way with the concurrent British investigation, at trial, one of the prosecution's key witnesses had read, reviewed, and even made markings on the transcripts of compelled testimony obtained from the defendants by British officials. *Id.* The Court held that the Fifth Amendment applied to any compelled statements made to foreign officials, even when such statements were the result of lawful compulsion rather than physical coercion. *Id.* at 83.

Like the defendants in *Allen*, Spector was lawfully compelled to make inculpatory statements to foreign officials and she was not guaranteed any form of derivative use immunity. However, this case is far more egregious than the attempted violations in *Allen*. In *Allen* the statements themselves were never offered into evidence, only the testimony of a witness who had reviewed and read those statements. Here, the prosecution is attempting to admit the statements *themselves* as substantive evidence against Spector in order to demonstrate her guilt.

In *Brulay*, the defendant was convicted of conspiracy to smuggle methamphetamine into the United States from Mexico. The defendant was arrested in Mexico by Mexican officials after his vehicle was observed to be weighed down in the rear. *Brulay*, 383 F.2d at 347. The defendant made inculpatory statements to Mexican officials throughout the course of the investigation. *Id.* at 348. Although the court held that statements made by the defendant were voluntary the

opinion, citing *Bram*, explicitly held that the test of voluntariness applied to any statements made by the defendant, regardless of whether those statements were made to foreign officials. *Id.* at 348-49.

Many of the pertinent facts in this case are substantively indistinguishable from the facts in *Brulay*. Spector was subjected to questioning by foreign officials for a crime which was unlawful in both the foreign jurisdiction and in the United States and no American officials took part in this portion of the questioning. Additionally, the court held in *Brulay* that "the Tijuana municipal policemen who made the seizure were not acting at the instigation of United States customs or narcotic officials." *Id.* As such, Spector's case falls squarely within the reasoning of the court in *Brulay* that the Fifth Amendment privilege is a trial right which disallows all compelled statements, regardless of whether those statements were made to law enforcement officials of the United States or of a foreign jurisdiction.

In addition, the Fourth, Fifth, and Tenth Circuits as well as the Military Court of Appeals have all applied the test of voluntariness to confessions elicited by foreign officials. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008); *United States v. Mundt*, 508 F.2d 904 (10th Cir. 1974); *Kilday v. United States*, 481 F.2d 655 (5th Cir. 1973); see also *United States v. Murphy*, 18 M.J. 220, 227 (C.M.A. 1984) (only allowing admission of statements found to be made freely and voluntarily). Additionally, some courts have called into question whether there need be any law enforcement presence, regardless of national allegiance, in order to trigger the Fifth Amendment Privilege.[1]

[1] "[E]ven though the confessions to the doctors were of a therapeutic value" the Fifth Amendment privilege against self-incrimination still applied. *United States v. Robinson*, 439 F.2d 553, 562 (D.C. Cir. 1970). (holding that a confession to a physician who was not operating under the direction of law enforcement, still must be made voluntarily in order to be admissible).

In *Kilday*, the Fifth Circuit in a one page opinion held that statements made to an Interpol Chief in Argentina were admissible. *Kilday*, 481 F.2d at 655. However, the court based its holding on a finding that the statements were not coerced and were made freely and voluntarily. *Id.* The court once again citing *Bram* found that the lack of *Miranda* warning were inapplicable to foreign sovereigns but that any statements used against a person in an American criminal trial required a determination that the statements were voluntary and not coerced. *Id.*

In *Mundt*, the defendant was convicted of conspiracy to import cocaine into the United States from Peru. The defendant was initially seized and questioned by the Peruvian officials and subsequently, over the course of an entire day, made statements which were used to convict him in Peru, where he served a sentence of just over a year. *Mundt*, 508 F.2d at 905. The court admitted the statements made to the Peruvian officials, and stated that, while *Miranda* certainly did not apply to the foreign officials, the facts were clear that the statements were made voluntarily by the defendant. *Id.* at 906.

In *Abu Ali*, the defendant, an American citizen studying in Saudi Arabia, was accused of assisting the terrorist organization al-Qaeda. *Abu Ali*, 528 F.3d at 221. After the defendant's arrest he was questioned by Saudi officials. *Id.* at 224. During the course of this questioning, the FBI was informed of the defendant's capture and allowed an opportunity to submit desired questions to the Saudi officials that would then be posed to the defendant. *Id.* at 225. The Saudi officials asked the defendant six questions as FBI agents observed the interrogation through a one-way mirror. Other than consular contact, the United States government was denied all contact with the defendant until nearly three months after his arrest. *Id.* The court held that his statements, although made solely to the Saudi officials, was still subject to the voluntariness test articulated in *Bram*. *Id.* at 234. Under this standard the court allowed his confession to be used

against him on a finding that "[I]n the case of an interrogation by foreign officials" the court would determine the "voluntariness of a defendant's statements by asking whether the confession is 'the product of an essentially free and unconstrained choice by its maker.'" *Id.* 232, 234 (internal citation omitted).

In each of the three foregoing cases, the circuits have ruled that confessions made by suspects in the custody of foreign officials must be voluntary if they are to be admitted during trial. To decide otherwise would be to deny the plain meaning of the Fifth Amendment and offend the primary purpose of the Bill of Rights. Just as was true in *Mundt*, *Kilday*, and *Abu Ali*, Spector was in the custody of foreign officials when her statements were made. R. at 8. Furthermore, as it is undisputed in the record that the statements made by Spector to the RIA were compelled and therefore not voluntary, such statements are inadmissible against Spector in her trial as a violation of her Fifth Amendment right against Self-Incrimination.

Therefore, this Court should uphold the ruling of the Fourteenth Circuit and hold the compelled statements made by Spector inadmissible.

III. Ms. Spector's Silence In Response to the Verbal Accusations Made by an FBI Agent are Inadmissible as Substantive Evidence of Her Guilt

An axiomatic truth essential to a proper understanding of the right against Self-Incrimination is that "[t]he prosecution may not . . . use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation." *Miranda*, 384 U.S. at 468. Furthermore, it has been repeatedly held by this Court that once a suspect is taken into custody, any actions on the part of law enforcement which should reasonably be expected to illicit an incriminating response, trigger the requirement that the suspect be given their *Miranda* warnings in order to have any statements made by them admitted against them in an American court. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Finally, the Fifth Amendment privilege protects all persons

from "being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting *Schmerber v. California*, 384 U.S. 757, 761-62 (1966)).

Additionally, law enforcement officials are prohibited from testifying about a defendant's choice to remain silent while the defendant is in custody, even if the *Miranda* warnings have not yet attached. *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997); *see also United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001). This is brought into clearer focus when viewed in light of this Court's holding that the right to remain silent "can be asserted in any proceeding" and that it extends to "any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar*, 406 U.S. at 444–45.

Therefore, because the FBI agent's conduct triggered the protections of *Miranda*, and because, notwithstanding the lack of *Miranda* warnings, Spector's silence in the face of accusations made by police while she was in custody is protected under the Fifth Amendment privilege, this Court should affirm the Fourteenth Circuit and hold her silence inadmissible as substantive evidence of her guilt.

A. Admission of Ms. Spector's silence violates the Miranda rule because the Agent's actions were reasonably likely to illicit an incriminating response and therefore constituted the functional equivalent of interrogation

The Fifth Amendment privilege extends to any action which is "testimonial, incriminating, and compelled...." In order to be considered to be testimonial, the accused's communication must explicitly or implicitly relate some sort of factual assertion or disclose information. *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 189 (2004). The Court has established that, in addition to the protections afforded the accused by the Fifth Amendment, a judicially crafted rule barring the admission of certain types of evidence against the accused is

necessary when the accused is in the custody of law enforcement and where the accused is the subject of a police interrogation. *See generally Miranda*, 384 U.S. at 468. Furthermore, the Court unequivocally has held that, once *Miranda* has attached, the State may not use a defendant's silence in the face of accusation against them. *Id.*

The Court has also held that it is not a requirement of the *Miranda* warnings that the police engage in actual questioning of the suspect. The "functional equivalent" of a custodial interrogation is sufficient to trigger the requirement that the *Miranda* warnings be given. *Innis*, 446 U.S. at 301. Therefore, the precedents are clear that once the threshold of *Miranda* has been crossed, the State may not use the silence of a defendant in the face of any interrogation against that defendant at trial as substantive evidence of guilt. Here, because the FBI agent's accusations levelled at Spector during the search of her home should have been reasonably expected to elicit an incriminating response, her silence in the face of those accusations is inadmissible as substantive evidence of her guilt.

A statement is not rendered admissible under Miranda simply because it is not made in response to a "particular question." The entire course of conduct of the officers must be examined to determine whether the statement was in response to unlawful conduct under *Miranda*. *United States v. Jackson*, 544 F.3d 351, 357 (1st Cir. 2008). Furthermore, "[t]he prosecution may not . . . use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation." *Miranda*, 384 U.S. at 468. It is therefore clear, based on the language used and the subsequent implementation of the rule articulated in *Miranda* that once the *Miranda* rule applies, the accused may not have their silence during the course of the interrogation used against them if their case is to go to trial. *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986);

Doyle v. Ohio, 426 U.S. 610, 618 (1976) (holding that the *Miranda* warnings carry the implicit understanding that silence will not result in any penalties on the accused).

When law enforcement confront, accuse, or antagonize a suspect who is in custody, in an effort to goad that suspect into responding, the *Miranda* rule has attached, and any silence or communicative response on the part of the suspect is therefore inadmissible against that person if their case were to go to trial. *United States v. Familetti*, 878 F.3d 53, 59 (2d Cir. 2017); *United States v. Bentley*, 30 F.3d 140 (9th Cir. 1994); *Nelson v. Fulcomer*, 911 F.2d 928, 934 (3d Cir. 1990); *United States v. Brown*, 720 F.2d 1059, 1068 (9th Cir. 1983). Spector's right to remain silent, and her right not to have that silence used against her would be violated by admission of the evidence offered by the Government in this case. In each of the following cases, the Circuit ruled that such tactics employed by law enforcement violated the proscriptions of *Miranda* and rendered the statements of the accused inadmissible.

In *United States v. Jackson*, the First Circuit ruled inadmissible the defendant's statement informing the police of the location of a gun in the apartment where the defendant was staying. *Jackson*, 544 F.3d at 355. The defendant was a convicted felon and therefore was not lawfully permitted to possess such a weapon under State substantive law. *Id.* The defendant did not make the incriminating statement directly in response to the officer's initial questioning. Instead, the defendant only spoke after the officer returned after a short absence and announced that another occupant consented to the search of the apartment. *Id.* The court held that a statement is not rendered admissible under *Miranda* "simply because it is not made in response to a particular question." *Id.* at 357. This is true because the "entire course of conduct of the officers must be examined to determine whether the statement was in response to unlawful questioning under *Miranda*." *Id.* The court further held that the officer's conduct constituted the functional

equivalent of an interrogation. This was true based on the totality of the circumstances including the fact that the defendant already was aware of the other occupant's consent to the search and such a statement by the officer only served to exert pressure on the defendant to incriminate himself. *Id* at 359-60.

Like in *Jackson*, Spector was subjected to the functional equivalent of interrogation during the search of her home. Although Spector made no direct statements, her silence is protected under the *Miranda* rule and thus is excluded if *Miranda* warnings should have been given at the time of her silence. *Miranda*, 384 U.S. at 468. Additionally, Spector's rights have been infringed to an even higher degree than the defendant in *Jackson* since the FBI agent speaking to Spector made the statements directly to Spector and regarding her guilt and the seriousness of the alleged offense for which she was in custody. In this way, Spector's silence *was* in response to a direct accusation by the FBI, whereas the defendant in *Jackson* was not responding to any one statement or "particular question" of the officer conducting the search. *Jackson*, 544 F.3d at 359-60. Therefore the FBI agent's actions in this case strike a chord with the First Circuit's reasoning that a law enforcement officer's statements to a defendant may invoke the *Miranda* requirements if they are intended to exert pressure upon the suspect to respond.

In *Nelson v. Fulcomer*, the Third Circuit, citing to *Innis* held that the police violated the defendant's *Miranda* rights by confronting the suspect with his alleged partner and informing the defendant that the partner had confessed. *Nelson*, 911 F.2d at 929. The court reasoned that such actions are very likely to spark an incriminating response if the suspect is in fact guilty. *Id.* at 934. Such a psychological tactic was, in the opinion of the court, exactly the type of actions on the part of law enforcement contemplated by the Supreme Court's decision in *Innis* and therefore

admission of any subsequent statements would violate a suspect's rights under *Miranda*. *Id.*; *See also United States ex rel. Doss v. Bensinger*, 463 F.2d 576 (7th Cir.).

Just as in *Nelson* Spector was being subjected to a psychological tactic which, taken in the totality of the circumstances, should have been reasonably expected to elicit an incriminating response. The FBI agent who made the accusations at Spector created a public spectacle by directing accusations at her in full view of the public. Federal law enforcement executed a warrant on Spector's house as she was forced to watch, while the FBI agent watching her engaged in what can only be described as goading behavior. It is immaterial that she did not verbally respond to such accusations as her silence is protected under *Miranda*.

In *United States v. Brown*, the Ninth Circuit held that a police officer's accusation that the suspect "sells dope to little black children" was the functional equivalent of a custodial interrogation. *Brown*, 720 F.2d at 1068. The court reasoned from the premise that "whatever manner the police seek to induce response from the prisoner himself, the Miranda right applies and the burden is on the Government to prove that any speech product it wishes to use resulted without its contrivance." *Id.* at 1066. In so holding the court reversed the conviction of the defendant and determined that the trial court had abused its discretion in allowing the officer's testimony. *Id.*

Here, as in *Brown* the emotionally charged and derisive comments made to Spector about her guilt and the seriousness of the charges against her trigger the protections of *Miranda*. Statements of such a nature cannot reasonably be viewed as being so benign such that no reasonable officer in those circumstances should recognize the potential for an incriminating response. The FBI agent's comments that Spector's alleged conduct was "shameful" and

"disgusting" is substantively indistinguishable from the comments made in *Brown*. R. at 9. As such the reasoning of the court in *Brown* is applicable to Spector's case.

As applied to the present case, the rule from *Innis* as it has been interpreted in the circuits demonstrates that the FBI agent's accusatory and antagonistic statements towards Spector render her silence in response inadmissible under the *Miranda* doctrine. Furthermore, the actions of the FBI agent towards Spector are of a more egregious character when considering the surrounding circumstances of the scene. During the search of Spector's residence, she was placed in a chair, in full view of a crowd. Subsequently she was accused verbally by the FBI agent of a crime which carries heavy social stigma. In post-9/11 America, one can hardly imagine a more serious charge than assisting terrorist organizations who conspire to murder Americans. Such pressure in the face of accusation, with a crowd of onlookers arguably within earshot, creates immense pressure upon the accused to respond to those statements, lest they be seen as assenting to the charge. This follows from the old maxim *qui tacet consentire videtur* (he who is silent agrees). The logic and brilliance of this common law understanding demonstrate the precise reason why such silence should not, and according to the Constitution cannot be used against a defendant at a trial to determine that person's guilt. Therefore, this Court should hold the FBI agent's statement to be the functional equivalent of a custodial interrogation, thus rendering Spector's silence in response to the accusations inadmissible in the Government's case-in-chief as substantive evidence of Spector's guilt

B. Fifth Amendment privilege protects Ms. Spector from the use of her post-arrest pre-*Miranda* silence as substantive evidence of her guilt

Even if this Court were to find that *Miranda* had not yet attached to Spector and she was not entitled to the protections afforded under that decision, her silence in the face of the FBI agent's accusations is nevertheless a privileged exercise of her Constitutional rights and may not

be offered as substantive evidence of her guilt in the prosecution's case-in-chief. This is true regardless of whether or not the silence is testimonial in nature. *Pennsylvania v. Muniz*, 496 U.S. 582, 615 (1990).

Furthermore, many of the Circuit Courts of Appeals which have addressed the issue, as well as a number of State Supreme Courts have held that introduction of a suspects post-arrest, pre-*Miranda* silence violates the Fifth Amendment privilege against Self-Incrimination. *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (holding that law enforcement officers may not testify about a defendant's silence in response to questioning even in a non-custodial interview); *United States v. Hernandez*, 948 F.2d 316, 321–24 (7th Cir.1991); *United States v. Whitehead*, 200 F.3d 634, 637–39 (9th Cir.2000). Other circuits have even gone so far as to ban pre-arrest silence from admission. See *Coppola v. Powell*, 878 F.2d 1562, 1567–68 (1st Cir.1989); *Combs v. Coyle*, 205 F.3d 269, 280–83 (6th Cir.2000); *Arizona v. VanWinkle*, 273 P.3d 1148 (Ariz. 2012).

In *Moore*, the defendant was stopped while operating a motor vehicle and running through several stoplights without stopping. Through the course of the stop the officer properly developed probably cause to search the vehicle, through observance of the suspect wearing an empty shoulder holster and a bullet-proof vest. At trial, the officer testified that nothing was said by any of the three occupants of the vehicle when the trunk was opened, revealing various types of illegal contraband. *Moore*, 104 F.3d at 380. In closing arguments, the prosecutor rhetorically asked the jury why the defendant did not act surprised or state anything in response to the evidence found as the trunk was opened. *Id.* at 284. The D.C. Circuit held that such use of the defendant's silence was improper and such evidence violated the defendant's constitutional rights. *Id.* at 385.

Like the defendant in *Moore*, Spector remained silent as she witnessed police conducting a lawful search. However, the similarities end there. Spector was subjected to a higher degree of confrontation as she was directly addressed as to the substantive charges already levied against her. This was conducted in full view of the public. These facts tend to increase the level of the constitutional violations present here to a much greater degree than what was found to be unconstitutional in *Moore*.

In *Burson*, the Tenth Circuit held that the defendant's rights were violated when the prosecution offered the testimony of two IRS agents who were conducting a non-custodial interview of the defendant. The agents were allowed to testify that the defendant refused to answer the questions the agents posed to him and that he did not wish to be questioned by them. *Burson*, 952 F.2d at 1220. The defendant was subsequently convicted of tax evasion. During the trial, the prosecution did not reference the defendant's silence in closing, and the court subsequently held that the admission of the agents' testimony, while impermissible, was harmless error and upheld the conviction based on the weight of the other evidence. *Id.* at 1201. The court specifically noted that the prosecution's purpose in offering the evidence "was to establish a relationship between [the defendant] and [another person]". *Id.*

As was true in *Burson*, Spector did not respond to the accusations levelled at her by the FBI agent. A significant distinction which creates a more heinous violation of Spector's rights is the relation her silence has to the FBI agent's statements. The prosecution in *Burson* did not offer the questions posed by the IRS agents when addressing the issue of the defendant's silence in that case. *Id.* However here, the record is clear that the FBI agent referred to her conduct as "shameful" and "disgusting" and that her silence in response to such accusations and statements

are intended to be offered as substantive evidence of guilty knowledge and conscience, rather than merely to establish a relationship between her and another person.

And, yet even still the court ruled in *Burson* that such silence was privileged and therefore inadmissible. With this in mind, the Constitution must offer more protection to a person in Spector's circumstances as she is placed in a much more vulnerable position than the defendant in *Burson*. Spector was in custody, and the content of the statements made to her by law enforcement directly place her silence in context thus rendering the evidence presented by the Government here far more probative and prejudicial than in *Burson*.

In *Hernandez*, the Seventh Circuit held that admission of a defendant's silence in the immediate time between the arrest and the reading of *Miranda* warnings was a constitutional violation. *Hernandez*, 948 F.2d at 317. The prosecutor asked the witness if, upon arrest, the defendant made any "immediate response". *Id.* at 322. When defense counsel objected the court allowed the question to be read again. *Id.* Defense moved for a mistrial and was denied, thus the evidence was admitted that, in the few moments between arrest and reading of *Miranda* warnings, the defendant had remained silent. *Id.*

Here, Spector's silence is even more incriminating than that present in *Hernandez*. Spector not only was in custody for a more extended period of time before her silence became at issue, but also her silence is in direct response to accusations made by law enforcement, as opposed to the defendant in *Hernandez* who merely remained mute in the face of the statement that he was under arrest. However, on similarity is that both in *Hernandez* and in the present case, the silence is in response to pertinent facts regarding the defendant's case. The statement that one is under arrest is an accusation of sorts and as such, it follows that if one's silence in the face of *that* information is inadmissible, then the silence of Spector in this case is also not to be

properly admitted. Based on the logic used by the court in *Hernandez* any silence which occurs in the course of a custodial arrest is inadmissible as substantive evidence of guilt in the Government's case in chief, and there is no significant logical distinction present here so as to allow Spector's silence to be used against her at trial.

In *Whitehead*, the Ninth Circuit held that the prosecution's witness was improperly questioned regarding the defendant's silence during a search incident to arrest. *Whitehead*, 200 F.3d at 636. The defendant had been arrested on narcotics charges while attempting to cross from Mexico into the United States. *Id.* at 634. He was placed in custody and was subsequently taken to the detention holding area while he was searched and his wallet was seized. *Id.* At trial, the prosecution asked the arresting officer a series of questions regarding the defendant's response, or lack thereof during the course of these events. *Id.* at 637-38. The court held that the line of questioning impermissibly referenced the defendant's right to remain silent and thus the trial court committed plain error in allowing such testimony. *Id.* at 639.

Here, Spector was in custody and her silence was in response to accusations made by law enforcement. Her silence carries with it an implication that she has no countering or logical response to the accusations levelled against her. In much the same way that the defendant in *Whitehead* need not respond to the circumstances surrounding his arrest, Spector should not be placed in the position of addressing the government's actions by responding to their accusations. As such her case is analogous to *Whitehead* because admission of this evidence would place the burden on the defendant to speak in order to explain or deny the accusations against them.

The Government, by seeking to offer this evidence, wishes to have their cake and eat it too. This is true because, assuming *arguendo* that *Miranda* does not apply and that were she to respond such statements would be admissible against her, there is simply no way for Spector to

not incriminate herself. If she speaks, she waives her privilege and can be convicted using her statements, however if she remains silent, her silence can be used against her. Such a construction of the Fifth Amendment privilege leaves the Constitution without any teeth.

The weight of these authorities lowers the scales heavily in favor of Spector. This Court should therefore rule that Spector's post-arrest pre-*Miranda* silence is inadmissible in the Government's case-in-chief as substantive evidence of Spector's guilt.

CONCLUSION

The Court should affirm the ruling of the Court of Appeals for the Fourteenth Circuit. The Court should adopt the ruling of the Eleventh Circuit in *Charles* and hold that a defendant will always have a right to confront the interpreter of his or her foreign language statements. If the Court will not adopt the per se rule of *Charles*, it should apply the Ninth Circuit's four-part test, which will prove that the interpreter's statement cannot fairly be attributed to Spector. Therefore, it is a separate out-of-court testimonial declaration, which entitles Spector to confront the witness against her.

The Court should also reaffirm the longstanding principle, dating back to the 1897 *Braun* decision, that statements made by the accused need to have been voluntarily made in order to be used against them at trial. This principle holds true whether it is the United States government or a foreign government compelling the statement. Additionally, an accused who exercises the Constitutional right to remain silent while in custody must not have that silence used against him. The Court should rule that Spector's post-arrest, pre-Miranda silence is therefore inadmissible as substantive evidence of her guilt.

Respectfully submitted,

Team 36
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